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No. 499

In the Supreme Court of the United States

October Term, 1961

[redacted], ET AL., PETITIONERS

v.

[redacted] ATTORNEY GENERAL, [redacted], ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[redacted]

[redacted]

[redacted]

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[redacted], D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 499

CHUNG WING PING, ET AL., PETITIONERS

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 27–31; Pet. App. 13–18) is not yet reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1961 (R. 27, 32; Pet. App. 13). The petition for a writ of certiorari was filed on Octo-

[1] The record consists of a one-volume joint appendix which contains various papers and proceedings in the district court and the court of appeals, and to which reference will be made as "R". We have asked the district court to forward to this Court the administrative files of each of the petitioners

ber 17, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the cause is moot.

2. Whether, in a declaratory suit alleging an illegal agreement among government officials amounting to blanket prejudgment without regard to the individual merit of various applications for "refugee-escapee" visas, the district court properly granted the government's motion for summary judgment, where the administrative records indicated that the applications were considered on their merits, and the petitioners admitted that they had no knowledge or facts to support their conclusory allegations of an unlawful agreement.

3. Whether the district court properly denied a motion by the petitioners for a continuance to take depositions of various government officials, where the application was not made until ten months after the complaint had been filed, on the day before the court conducted a hearing on a motion by the government for summary judgment.

STATUTES, REGULATIONS AND RULE INVOLVED

Section 15 of the Act of September 11, 1957, 71 Stat. 643, 50 U.S.C. App. 1971a note, provides in pertinent part:

> SEC. 15(a) Notwithstanding the provisions of section 20 of the Refugee Relief Act of 1953, as amended * * *, special nonquota immigrant visas authorized to be issued under section 3 of that Act which remained unissued on Janu-

ary 1, 1957, shall be allotted, and may be issued by consular officers as defined in the Immigration and Nationality Act, in the following manner:

(1) Not to exceed two thousand five hundred visas to aliens described in * * * [irrelevant category];

(2) Not to exceed one thousand six hundred visas to aliens described in * * * [another irrelevant category];

(3) All the rest and remainder of said visas to aliens who are refugee-escapees as defined in subsection (c).

(b) The allotments provided in subsection (a) of this section shall be available for the issuance of immigrant visas to the spouses and unmarried sons or daughters under twenty-one years of age * * * of persons referred to in subsection (a) of this section if accompanying them: *Provided*, That each such alien as described in this section, is found to be eligible to be issued an immigrant visa and to be admitted to the United States under the provisions of the Immigration and Nationality Act: *Provided, further*, That all special nonquota immigrant visas authorized to be issued under this section shall be issued in accordance with the provisions of section 221 of the Immigration and Nationality Act: *Provided, further*, That a quota number is not available to such alien at the time of his application for a visa.

(c)(1) For purposes of subsection (a), the term "refugee-escapee" means any alien who, because of persecution or fear of persecution on account of race, religion, or political opinion has fled or shall flee (A) from any Communist,

> Communist-dominated, or Communist-occupied area * * *, and who cannot return to such area * * * on account of race, religion, or political opinion.
>
> * * * * *
>
> (d) Except as otherwise provided in subsection (a) of this section, nothing in this section shall be held to extend the Refugee Relief Act of 1953, as amended * * *, and nothing in this section shall be held to authorize the issuance of special nonquota immigrant visas in excess of the number provided in section 3 of that Act.

Section 245 of the Immigration and Nationality Act of 1952, as amended, August 21, 1958, 72 Stat. 699, but prior to the amendment of July 14, 1960, 74 Stat. 505, provided in pertinent part:

> (a) The status of an alien who was admitted to the United States as a bona fide nonimmigrant may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, (3) an immigrant visa was immediately available to him at the time of his application, and (4) an immigrant visa is immediately available to him at the time his application is approved. A quota immigrant visa shall be considered immediately available for

the purposes of this subsection only if the portion of the quota to which the alien is chargeable is undersubscribed by applicants registered on a consular waiting list.

(b) Upon the approval of an application for adjustment made under subsection (a), the Attorney General shall record the alien's lawful admission for permanent residence as of the date the order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the quota of the quota area to which the alien is chargeable under section 202 for the fiscal year current at the time such adjustment is made.

* * * * *

Section 245(a) of the Immigration and Nationality Act of 1952, as amended, July 14, 1960, 74 Stat. 505, provides:

The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

Department of State Regulation, Section 44.2, 22 C.F.R. 44.2, provides in pertinent part:

> (d) *Refugee-escapees.* This class shall consist of aliens who, because of persecution or fear of persecution on account of race, religion, or political opinion have fled or shall flee (1) from any Communist, Communist-dominated, or Communist-occupied area * * *, and who cannot return to such area, or to such country, on account of race, religion, or political opinion. An immigrant visa issued to an alien within the class described in this paragraph may be issued at any United States consular office which is authorized to issue immigrant visas * * *.

Department of State Regulation, Section 44.3, 22 C.F.R. 44.3, provides in pertinent part:

> (a) *Applicants for refugee-escapee classification.* In support of an application for refugee-escapee classification the alien shall submit a statement furnishing biographic data and describing the circumstances of his flight, escape, departure, or forceful removal from a Communist-dominated, or Communist-occupied area * * *, the hardship and persecution suffered, and a summary of his educational attainments, professional or technical abilities, and any manual skills or vocational experience which would tend to make such applicant of maximum value to the United States. This statement * * * shall be supported by character references from interested persons bearing upon the applicant's attachment to the principles of constitutional democratic government.

Rule 56, F.R. Civ. Proc., provides in pertinent part:

* * * * *

(b) *For Defending Party.* A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *

* * * * *

(e) *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

* * * * *

STATEMENT

The petitioners are seven Chinese nationals who entered the United States between 1947 and 1956 and have continuously remained in the United States up to the present time. Six entered between 1951 and 1956 as alien crewmen, receiving crewmen's landing permits, which were valid for no longer than 29 days. Petitioner Ng Yen entered through San Juan, Puerto Rico, in January 1947 as a "visitor for pleasure."

In individual deportation proceedings, each petitioner was found to be a deportable alien. Later, each applied to the Office of the District Director of the Immigration and Naturalization Service in New York for adjustment of status under Section 245(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1255(a), *supra*, pp. 4–5, to that of a permanently admitted refugee who had fled his native land due to fear of persecution on account of political opinion. In the meantime, each also applied to the Department of State for a special non-quota immigrant visa as "refugee-escapees" from Communist or Communist-dominated lands, under Section 15(a)(3) of the Act of September 11, 1957, 50 U.S.C. App. 1971a note, *supra*, pp. 2–4.

In 1959, the review committee of the Office of Refugee and Migration Affairs of the State Department rejected the applications of the crewmen-petitioners on the ground that some of them did not qualify as "refugee-escapees" since no showing was made that they left China on account of fear of perse-

cution, and that none of them possessed skills, abilities, education or experience which would make their presence in the United States of maximum value to the United States. The committee rejected the application of Ng Yen on the ground that he had "absolutely no claim" to refugee-escapee status since he was "outside of China many years before the Communists even threatened domination of that country."[2]

Following notification that the visa applications had been rejected, the Office of the District Director of the Immigration and Naturalization Service in New York denied the applications for adjustment of status. Five petitioners appealed this decision to the Office of the Regional Commissioner who subsequently affirmed the action taken by the District Director. All of the petitioners were notified that arrangements for their deportation to Hong Kong had been made and that they would be deported between August and November 1959.

On December 2, 1959, by complaint filed in the District Court for the District of Columbia, the petitioners and three others[3] sought a declaratory judg-

[2] The original applications of the petitioners to the Attorney General for discretionary relief were denied on the ground that existing regulations regarding alien crewmen made them ineligible for relief. The regulations were subsequently amended and the petitioners received notice to resubmit their applications, which was done.

[3] Two (Kwok Sui Kam and Wong Chong) did not appeal from the decision of the district court. The third did not join in the petition for a writ of certiorari.

ment that the government acted arbitrarily and contrary to law in denying their non-immigrant visa applications (R. 3–5). They alleged that the defendants (the Attorney General and the Secretary of State), pursuant to an illegal agreement, failed to consider the visa applications on the merits of the individual cases (R. 4). The government's answer, which denied these allegations and set up specific defenses, was filed on February 2, 1960 (R. 5–7).

Shortly thereafter, each of the petitioners' applications for "refugee-escapee" visas was reconsidered by the Office of Refugee and Migration Affairs in the State Department. The reviewing committee of that Office found no cause to alter its original opinions that the petitioners were ineligible for the non-quota status sought "because they [did] not meet the statutory and/or administrative standards prescribed for qualification under section 15 of the Act of September 11, 1957."

On September 9, 1960, the government moved for summary judgment on the ground that there was no genuine issue as to any material fact, and that it was entitled to a judgment as a matter of law (R. 7–8). The certified administrative record relating to each petitioner was filed in the district court with the motion. A hearing on the motion for summary judgment was set for October 19, 1960. On October 18, 1960, the petitioners filed a cross-motion for a continuance of the hearing until such time as they could take the affidavits of officials of the government with regard to the "policies devised by the Commissioner of Im-

migration and Naturalization" concerning treatment of applications of seamen for adjustment of status (R. 10–11). An accompanying affidavit of counsel indicated that the petitioners had no knowledge or information regarding the alleged "illegal agreement" among government officials but surmised that an agreement existed to deny applications of crewmen merely because they were seamen (R. 11–12).

Following argument on the applications, the district court, on October 25, 1960, granted the government's motion for summary judgment and denied petitioner's motion for a continuance for the purpose of taking depositions (R. 25). The court of appeals affirmed the order of the district court (R. 27–31; Pet. App. 13–18).

ARGUMENT

1. There is no occasion for further review by this Court. The case not only presents no issue of general importance but it is now moot insofar as the six petitioners who entered the United States as crewmen are concerned. On July 14, 1960, subsequent to the commencement of the instant action in the district court but prior to the entry of summary judgment, Section 245(a) of the Immigration and Nationality Act of 1952 was amended by Public Law 86–648 (74 Stat. 504) specifically to exclude the application of Section 245 to a "crewman." The Attorney General, through the Immigration and Naturalization Service, is now precluded from adjusting the status of those petitioners who entered the United States as crewmen since the amended statute, denying that form of

relief to alien crewmen, would have to be followed.[4] See *Ziffrin* v. *United States*, 318 U.S. 73, 78; *United States ex rel. Wiczynski* v. *Shaughnessy*, 185 F. 2d 347, 349 (C.A. 2); *Fassilis* v. *Esperdy*, 192 F. Supp. 84, 86–87 (S.D. N.Y.). As for the seventh petitioner (Ng Yen), who entered the United States in January 1947 as a "visitor for pleasure," there is not even colorable validity to the claim that his application was not individually considered. He was found to have "absolutely no claim" for a refugee-escapee visa, having been "outside of China many years before the Communists even threatened domination of that country." See 22 C.F.R. 44.2 and 44.3, *supra*, p. 6.

2. In any event, contrary to the petitioners' contention (Pet. 5–8), the district court properly granted the government's motion for summary judgment because there was no genuine issue of material fact to be determined in this case. The denial by the government, in its answer, of the conclusory allegations in the complaint that there was a "void and illegal agreement between the defendants" to discriminate against the petitioners and deny them proper consideration of their visa applications did not, in the circumstances of this case, present a genuine issue of material fact. In support of the motion for summary judgment, the government filed the certified administrative record relating to each of the petitioners which affirmatively showed that each of the applica-

[4] The government presented the issue of mootness to the court of appeals by way of supplemental memorandum. That court, however, did not reach the question of mootness, disposing of the appeal on the merits (Pet. App. 16).

tions was individually considered on the merits. Against this prima facie showing of proper administrative conduct, the petitioners presented no allegations of fact to substantiate their general allegations in the complaint of a "void and illegal agreement between the defendants." Indeed, counsel for the petitioners admitted in his affidavit and at the hearing on the summary judgment motion that he did not have any information or knowledge surrounding the alleged "illegal agreement," and that such knowledge or information was "solely" within the hands of the government (R. 11–12, 23, 24, 25).

In the face of the prima facie showing made by the government of proper administrative conduct, the conclusory allegations of the petitioners that there was improper conduct amounted to no more than suspicion or conjecture, and were insufficient to raise genuine issues of material fact sufficient to bar summary judgment under Rule 56, F.R. Civ. Proc., *supra*, p. 7. See, *e.g.*, *Riley* v. *Titus*, 190 F. 2d 653, 654–655 (C.A.D.C.), certiorari denied, 342 U.S. 855; *Marion County Cooperative Ass'n* v. *Carnation Co.*, 214 F. 2d 557, 561–562 (C.A. 8); *Schneider* v. *McKesson & Robbins, Inc.*, 254 F. 2d 827, 831 (C.A. 2) (dicta); *Banco de Espana* v. *Federal Reserve Bank of New York*, 28 F. Supp. 958, 973 (S.D. N.Y.), affirmed, 114 F. 2d 438 (C.A. 2); *Williams* v. *Kolb*, 145 F. 2d 344 (C.A.D.C.).[8]

[8] Petitioner's reliance upon *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, where this Court held that the allegations of prejudgment were sufficient to warrant a hearing in the district court in a habeas corpus action, is misplaced. [Footnote continued]

3. Finally, there is no merit to the petitioners' contention (Pet. 9–11) that the district court abused its discretion when it refused to grant a continuance for the purpose of allowing depositions to be taken of the government officials charged with the improper agreement. As shown in the Statement, *supra*, pp. 10–11, the application for a continuance was not filed until October 18, 1960, the day before the hearing was to take place on the government's motion for summary judgment, and more than ten months after the petitioners had filed their complaint in the district court. No effort at discovery was undertaken until the day before the hearing on the motion for summary judgment. It was thus within the court's proper discretion to deny the application on this score alone. See *Surkin* v. *Charteris*, 197 F. 2d 77, 79 (C.A. 5). As the court of appeals pointed out (R. 30; Pet. App. 17), "(d)iligent prosecution of a cause of action which is dependent for success upon discovery demands that the plaintiff seek discovery in preparation of his case and not as a backdoor defense to

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In that case, the movant alleged that the Attorney General included the movant's name in a confidential list of "unsavory characters" whom the Attorney General wanted deported; and that the intention to deport the listed people was made clear when the list was circulated among the members of the Board of Immigration Appeals. A specific offer of proof that the Commissioner of Immigration could not do anything for the movant because the latter was on the Attorney General's list was made and rejected by the district court. In the instant case, there were no factual allegations to support the conclusory allegation that there was a "void and illegal agreement between the defendants," and, as noted above in the text, the administrative record showed the contrary.

a test of the merit of his claim." We add that, of course, we do not concede the right to obtain discovery of the type sought here on the basis of the sort of allegations made here—even if the efforts at discovery were timely pursued.

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

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